



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.51 OF 2015

PAULINE OWINO OSINO.....PLAINTIFF/RESPONDENT

=VERSUS=

1. OMARI ALI BWERU

2. HASSAN CHARO ALI.....DEFENDANTS/APPLICANTS

R U L I N G

Introduction:

1. What is before me is the Application by the Defendants dated 2nd June 2015 seeking for the following orders:

(a) THAT the Plaintiff be ordered to immediately release the original Title deed belonging to the Defendants, that is TITLE NO. CHONYI/BEDZOMBO/KITSOENI/744 and the Defendants to demarcate 15 acres to await the final determination of this suit.

(b) THAT, the court do order the Defendants to deposit Kshs.750,000/- within one month of the release of the original title deed in a joint account by the advocates of the parties and or the court, being the deposit paid in respect of the disputed contract.

(c) THAT, the Defendants/Applicants not to sale any parcel especially fifteen (15 acres) that was embarked for the Plaintiff until the hearing and determination of this matter.

(d) THAT the court do grant any other order that it deems fit to grant in the circumstances of this case.

The Defendant's/Applicants' case:

2. The 1st Defendant deponed that in July 2013, he entered into a contract with the Plaintiff wherein the Plaintiff paid Kshs.750,000 as deposit for 15 acres out of over 110 acres of their land; that the Plaintiff took possession of the original Title Deed and that at the time of selling the 15 acres, the Defendants' family needed money to sort out various issues.

3. According to the 1st Defendant, the Plaintiff has not been interested in completing the transaction and that they cannot deal in the property because the Plaintiff is holding on the original title deed.

The Plaintiff's/Respondent's case:

4. According to the Plaintiff, she agreed to purchase 15 acres from the Defendants for Kshs.7,500,000; that she paid the requisite 10% deposit and that although she performed her part of the agreement, the Defendants failed to perform their part.
5. According to the Plaintiff, the Defendants want this court to re-write the contract that was entered into.
6. I have considered the submissions and authorities filed by counsels.

Analysis and findings:

7. In the Plaint, the Plaintiff is seeking for an order of specific performance by the Defendants by transferring the identified portion measuring 15 acres of plot number Chonyi/Bedzombo/Kitsoeni/744. The whole land measures 45.88 hectares.
8. According to the sale agreement of 29th July, 2013, the purchase price of the 15 acres was Kshs.7,500,000 and the Plaintiff paid to the Defendant's the requisite Kshs.750,000 being the 10% deposit.
9. The contract between the Plaintiff and the Defendant provided that upon payment of 10%, the Defendants were to deposit the original Title Deed to the Plaintiff which they did. The payment of the balance of Kshs.6,750,000 was to be paid on completion of the sub-division and upon the Defendants obtaining the consent to transfer, signing of the transfer and obtaining a title deed in favour of the Plaintiff.
10. The Defendants have not shown any evidence that they have obtained consents to subdivide and transfer the land, and that the 15 acres has actually been transferred to the Plaintiff. The Defendants have not told this court why they want the Plaintiff to deposit the title deed for the whole land in court when the contract between them and the Plaintiff is clear on the obligations of each party.
11. What the Defendants are asking the court to do is to re-write the contract between themselves and the Plaintiff, which is not permissible.
12. If the Defendants' problem is the payment of the accumulated rates, then they should enter into another agreement with the Plaintiff for the Plaintiff to offset the accumulated rates and the amount paid by the Plaintiff to be part payment of the purchase price. Otherwise, the Defendants ought to comply with the agreement by completing it.
13. Indeed, considering that there is no evidence, prima facie, that the Plaintiff is in breach of the Agreement of 25th July, 2013, the Defendants cannot even rescind the contract.
14. For those reasons I dismiss the Application dated 2nd June, 2015 with costs.

Dated and delivered in Malindi this 25th day of **September** 2015.

O. A. Angote

Judge